

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

INDRA KIRAN PRATAP; VIJEN
PRATAP; MAVINIK SINGH;
DHRITIKA SINGH,

Petitioners,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-71492

Agency Nos. A77-849-880
A77-849-881
A77-849-882
A77-849-883

MEMORANDUM^{*}

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted June 16, 2006
San Francisco, California

Before: GOODWIN, HUG, and O'SCANNLAIN, Circuit Judges.

Indra Kiran Pratap ("Pratap"), an ethnic Indian native and citizen of Fiji,
entered the United States with a non-immigrant tourist visa on September 5, 1999,

^{*}This disposition is not appropriate for publication and may not be cited to or by
the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

and was authorized to remain until March 4, 2000. She failed to depart as required. On March 6, 2000, Pratap filed an application for asylum.¹ At a Master Calendar hearing held on June 9, 2000, Pratap admitted the factual allegations and conceded removeability but applied for relief in the form of political asylum under Section 208 of the Immigration and Nationality Act ("the Act"), withholding of removal under Section 241(b)(3) of the Act, and relief under Article III of the Convention Against Torture ("CAT"). The Immigration Judge ("IJ") denied asylum and withholding of removal, but failed to address Pratap's CAT claim. Pratap appealed, and the Board of Immigration Appeals ("BIA") dismissed each of her claims—including for CAT protection. Before us is Pratap's petition for review of that dismissal. We GRANT the petition and REMAND to the BIA.

I. DISCUSSION

We have jurisdiction over the BIA's decision and Pratap's final order of removal pursuant to section 242(a) of the INA, 8 U.S.C. § 1252(a)(1). Because the BIA undertook an independent review of the IJ's findings, we may review only the BIA's decision, not that of the IJ. *See Simeonov v. Ashcroft*, 371 F.3d 532, 535

¹The Notice to Appear also alleged Pratap's husband and two minor children were non-immigrants remaining in the United States for a time longer than permitted. As co-respondents, their applications were derivative of and entirely dependent on the outcome of Pratap's application.

(9th Cir. 2004). We review for substantial evidence the BIA's decision that Pratap failed to establish eligibility for asylum, withholding of removal, or relief under the CAT. *See Njuguna v. Ashcroft*, 374 F.3d 765, 769 (9th Cir. 2004) (asylum); *Bellout v. Ashcroft*, 363 F.3d 975, 979 (9th Cir. 2004) (CAT).

A. Adverse Credibility

Reviewing the BIA decision only, as we must, we hold that the BIA's exclusive reliance on minor discrepancies, inconsistencies, and omissions cannot, without more, justify its adverse credibility determination. In *Chen v. INS*, we held that "[a]dverse credibility determinations based on minor discrepancies, inconsistencies, or omissions that do not go to the heart of an applicant's asylum claim cannot constitute substantial evidence." 266 F.3d 1094, 1098 (9th Cir.2001), *overruled on other grounds by* 537 U.S. 1016 (2002). Similarly, we held in *Singh v. Ashcroft* that minor discrepancies which reveal nothing about an asylum applicant's fear for his safety do not constitute a valid ground upon which to doubt an asylum applicant's credibility. 301 F.3d 1109, 1112 (9th Cir. 2002) (citing *Vilorio-Lopez v. INS*, 852 F.2d 1137, 1142 (9th Cir.1988)). Nor does the omission of minor details from an asylum applicant's earlier testimony provide such a ground. *Aguilera-Cota v. I.N.S.*, 914 F.2d 1375, 1382 (9th Cir. 1990).

The central deficiency in Pratap's testimony is her inconsistent recall of certain dates and details related to the events in Fiji motivating her to resist removal. The BIA relies primarily on three such inconsistencies. First, Pratap's testimony before the IJ was that a beating and attempted rape occurred in January 1999. However, the BIA observes that Pratap testified before the asylum officer that this incident occurred in April 1998. Pratap claims any discrepancy is the result of miscommunication, misinterpretation, or translator mistake, but either way, "alleged inconsistencies in dates that reveal nothing about a petitioner's credibility cannot form the basis of an adverse credibility finding." *Bandari v. INS*, 227 F.3d 1160, 1166 (9th Cir. 2000). The heart of Pratap's asylum claim is not *when* her landlord attempted to rape her, but *that* he attempted it, and why.²

Second, Pratap testified in her asylum interview "that she was hit with a glass bottle, but that it did not cut her." However, the BIA observes that Pratap testified before the IJ that she sustained a minor cut on her foot from the bottle.

²Attempted rape will constitute past persecution, or not, irrespective of its occurrence at the beginning versus the middle of a two-year time line of mistreatment.

This not only fails to go to the heart of Pratap's claim but is irrelevant to it. Again, the important point is that she was attacked at all.³

Finally, the BIA observes that Pratap variously testified that her family's lease with their ethnic Fijian landlord expired in August 1999; that she was uncertain of the date of expiration of her lease; and that the lease expired in December 1999. Pratap's brother-in-law's will suggests the lease may have expired after January 2000. But the expiration date of the lease does not go to the heart of Pratap's claim for asylum because her rationale for seeking asylum—in essence, to avoid racially-motivated ethnic cleansing by ethnic Fijians—does not depend on which expiration date is correct.

Pratap's credibility might have been susceptible to a stronger critique than the BIA elected to offer, but the skeletal critique it *did* provide cannot alone constitute substantial evidence, especially in light of the government's exceptionally weak defense of it at oral argument. Accordingly, we reverse the BIA's affirmance of the IJ's adverse credibility determination.

³The insignificance of the alleged injury means that whether Pratap suffered past persecution based on the thrown bottle must be contingent, not on the injury that *did* result, but on the injury that the attack was *intended to* and *might have* caused.

B. CAT Protection

The government agrees that we must remand Pratap's CAT issue. The IJ failed to pass on Pratap's CAT issue. By addressing it *de novo*, the BIA exceeded the scope of its review authority. *See* 8 C.F.R. § 1003.1(d)(3)(i), (iv). Eligibility for protection under the CAT requires a factual finding that Pratap is more likely than not to be tortured if she is returned to Fiji, but 8 C.F.R. § 1003.1(d)(3)(iv) provides that "the Board will not engage in factfinding in the course of deciding appeals," and if "the Board cannot properly resolve an appeal without further factfinding," a party "must file a motion for remand," or, on its own initiative, "the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service." *Id.*

Even if the BIA were empowered to adjudicate Pratap's CAT eligibility, the analysis it performed was inadequate. Our cases entitle Pratap to an independent review of her claim under the CAT. *See, e.g., Kamalthas v. INS*, 251 F.3d 1279, 1283 (9th Cir. 2001); *see also* 8 C.F.R. § 208.16. Instead, the BIA simply observed that, "inasmuch as the respondents have failed to meet the burden necessary to establish eligibility for asylum, it follows that they have also failed to satisfy the higher standard required for withholding of removal or relief under the Convention Against Torture." This reasoning conflates the burden of proof for

asylum with the analytically separate burden for relief under the CAT. *See Kamalthas*, 251 F.3d at 1283. Pursuant to 8 C.F.R. § 208.16(c)(3), “all evidence relevant to the possibility of future torture shall be considered,” even apart from prior findings in the asylum context. Nowhere in its opinion did the BIA consider country conditions in Fiji, which Pratap argues corroborate a widespread practice of torture against ethnic Indians.

Accordingly, and in recognition of the BIA’s lack of statutory authority to conduct an independent analysis of Pratap’s eligibility for CAT relief, we remand to the BIA to remand to the IJ to make initial findings on the question.

II. CONCLUSION

For the foregoing reasons, we **REVERSE** the BIA’s affirmance of the IJ’s adverse credibility determination and **REMAND** to the BIA for additional findings on whether Pratap’s allegations, taken as true, amount to past persecution. We also **REMAND** to the BIA to remand to the IJ to make initial findings on whether Pratap’s allegations amount to torture qualifying her for protection under the CAT.